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No. 03-

IN THE

Supreme Court of the United States

VILLAGE OF ISLANDIA, NEW YORK BOARD OF FIRE UNDERWRITERS, and ALEXANDER C. PIRNIE,
Petitioners,

v.

ELECTRICAL INSPECTORS, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case arises from a local government's designation of a non-for-profit, nongovernmental corporation to be the exclusive provider of electrical inspections within village limits. The following questions are presented for the Court's review:

1. Whether the antitrust immunity that attaches when the adverse effect *on competition* of an exclusive designation is held authorized under State law, *see Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), is overcome by a would-be competitor's allegations that the designee is "abusing the monopoly," by providing local residents "low quality service"?

2. Whether "heavily factual" federal court scrutiny of local government supervision of the designee's performance is compatible with the federalism principles on which state action immunity is grounded?

3. Whether a local government whose only challenged conduct has been judicially determined to satisfy the prerequisites for immunity established in *Hallie* may nonetheless be required to defend its supervision of its designee's performance in a Sherman Act suit?

PARTIES TO THE PROCEEDING BELOW

Petitioners Islandia, New York Board of Fire Underwriters, and Alexander C. Pirnie were appellees in the court below. Respondent Electrical Inspectors, Inc. was appellant.

The Villages of Roslyn, Oyster Bay Cove, Island Park, Brookville, North Hills, Flower Hill, Great Neck, Great Neck Estates, Kings Point, Port Washington North, Sea Cliff, Saddle Rock and Baiting Hollow, though named in the original caption of the court of appeals, did not participate in those proceedings, nor are they petitioners here.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The New York Board of Fire Underwriters is a legislatively-chartered not-for-profit "body, corporate and politic." It has no parent corporation nor stockholders.

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OPINIONS BELOW

The decision of the Second Circuit panel, as amended, is reported at 320 F.3d 110, and is reprinted in the appendix ("App.") at 1a. The district court opinion, reported at 145 F. Supp. 2d 371, is reprinted in the appendix, beginning at 31a. The original opinion, which has been withdrawn, is reprinted beginning at 43a. The orders denying rehearing and rehearing en banc may be found at 72a.

JURISDICTION

The Court of Appeals for the Second Circuit entered its judgment denying on rehearing on March 18, 2003. Justice Ginsburg entered an order extending the time to file to July 31, 2003. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 1, 2

N.Y. EXEC. L. 370 *et seq.*

19 C.R.R. § 429 (1981)

The text of these are set out in full in the appendix.

Statement of The Case

This case presents important questions about the antitrust protection for governmental acts recognized in *Parker v. Brown*, 317 U.S. 341 (1943), and *Town of Hallie v. City of Eau Claire,* 471 U.S. 34 (1985). It arises from an action taken by a local government, pursuant to State law and in furtherance of core public safety responsibilities: a resolution passed by Petitioner, the Village of Islandia, New York, designating a quasi-public, not-for-profit, fire safety body, the New York Board of Fire Underwriters (the "Board" or "New York Board," also a Petitioner), as the sole provider of officially-recognized electrical inspections within Village boundaries.[1]

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[1]Petitioner Alexander C. Pirnie was President of the New York Board, when suit was filed, but has since retired. *See* App.5a n.3 (noting that court's "legal conclusions regarding the Board apply equally to Pirnie").

Although recognizing that single-source provision – and restriction of competition it entails – were a plainly foreseeable result of New York laws vesting the State's local governments with responsibility for fire code inspections, the Second Circuit held that the district court erred in dismissing, on immunity grounds, antitrust claims of a for-profit inspector excluded from the "Islandia market," Respondent Electrical Inspectors, Inc. ("EII"). Citing EII's allegations that the New York Board was "abusing" the (lawful) "monopoly" conferred by the resolution, *e.g.*, by providing "low quality service," the appeals court held that immunity would require a further showing: that Islandia's supervision of the Board was sufficiently "active," *see California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

The court then ruled that the immunity – and potential liability – of *the Village* should depend on the outcome of the inquiry into its "supervision." While declining to decide what relief, if any, could ultimately be entered against Islandia, the Second Circuit decision described the federalism concerns that would ordinarily weigh against federal court intervention as less "pressing" here, because the defendant is a local government, rather than a State, and because only injunctive relief is sought.

As we explain herein, this re-framing of state action immunity will have significant, immediate effects not only on a wide range of litigated disputes, but on the basic policy decisions of State and local governments.

Factual Background

1. Islandia is an incorporated village of some 3,000 inhabitants, located in Suffolk County, on New York's Long Island. In August 1988, the Village Trustees enacted a resolution – which has been renewed annually, since – designating the New York Board of Fire Underwriters as Islandia's "electrical inspection agency."

2. The Board is a legislatively-chartered not-for-profit

"body, corporate and politic," 1930 N.Y. L. Ch. 241; *see also* 1867 N.Y. L. Ch. 846, whose members include some 96 companies authorized to write fire insurance policies within the State. Consistent with its fire prevention mission – and with the special fire danger that faulty electrical installation threatens – the Board, for more than a century, has provided electrical inspection service to the public. Its inspections are conducted by a staff of salaried professionals, whose independence is reinforced by Board rules which prohibit them from performing electrical contracting work.[2]

3. Islandia's resolution was prompted by a 1981 New York statute providing for a uniform, locally enforced, Building and Fire Code, *see* N.Y. L. 1981 ch. 707, N.Y. EXEC. L. § 370 *et seq.* – and by implementing regulations requiring local governments to condition issuance of certificates of occupancy on applicants' obtaining qualifying electrical inspections. 19 N.Y.C.R.R. § 429.2(b), (c).[3]

4. Islandia's approach to its fire prevention responsibilities is not uncommon. A substantial number of New York municipalities (roughly 250 out of 1000) rely on the New York Board exclusively for electrical inspection services. Other local governments contract with or otherwise exclusively designate a *different* agency; others – mostly

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[2]The Board's electrical inspection practice was initiated in 1881, at the invitation of Thomas A. Edison. The Board's other major activity is operating the New York City Fire Patrol, whose members have special expertise in recovering property from burning and fire-damaged structures.

[3]In enacting the Uniform Fire Prevention and Building Code Act, the State Legislature declared, *inter alia,* that "it shall be the public policy of the state of New York" to "[p]rovide for the promulgation of a uniform code addressing building construction and fire prevention,* * * in full force and effect in every area of the state"; [and] "[e]ncourage local governments to exercise their full powers to administer and enforce the uniform code." *Id.* N.Y. EXEC. L. § 371(2). The Act prescribed standards for drafting the code and directed New York's Secretary of State to "promulgate rules and regulations prescribing minimum standards for [its] administration and enforcement." *Id.* § 381.

larger cities and towns – have salaried municipal employees perform inspections; and still others issue certificates of occupancy based on inspections performed by Respondent and/or other for-profit providers. *See* Ct. App. J.A.456 (Affidavit of Alexander Pirnie ¶¶12-13). Regulations in effect when Islandia designated the New York Board recognized that:

> the local legislative body of a city, town, or village may by resolution, provide that such inspections be performed by the following: "a designated officer or employee of the city, town or village"; "a designated officer or employee of another city, town, or village who is qualified to conduct such inspections"; "a person who is qualified to conduct such inspections and who performs such inspections pursuant to a contract with the city, town or village"; "an employee or agent of the county who is qualified to conduct such inspections"; or "a competent inspector, designated or approved by the city, town or village, whose fee shall be paid by the person * * * to which the building permit was issued."

App. 33a (quoting 19 N.Y. C.R.R. § 429.2(b)(2)(I)-(v)).[4]

5. In a district court affidavit, Frank Falco, Islandia's mayor and a member of the Board of Trustees at the time of the 1988 resolution, explained that the original designation decision was based on the Board's reputation and long experience, the reasonableness of its fee schedule, and the expense that the alterative – hiring a Village employee comparably qualified to perform inspections – would entail. The Mayor further attested that, between 1988 and 1995, he knew of no other inspection provider active in the area, and that the decisions, in more recent years, to continue the Board's status as exclusive provider reflected satisfaction with the quality of its performance; the increased expense the Village would incur in monitoring the work of multiple, competing inspectors; and concern that unbridled

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[4]These regulations were withdrawn in 1996. *See* n.9 *infra*.

competition could undermine public safety. *See* Ct. App. J.A. 607.[5]

District Court Proceedings

1. In 1999, EII filed this federal antitrust suit against the New York Board, the Village, and other Long Island villages (no longer parties to the case) which had designated the Board as the lone, officially-recognized electrical inspection provider.[6] The complaint alleged, among other things, that Islandia's resolution conferred a "de facto monopoly"; that the Board's service suffers as a result (*e.g.*, inspections are too cursory or not preformed promptly on request); and that Islandia does not sufficiently "supervise" the Board – *e.g.*, by adopting regulations that provide Islandia residents with "recourse [for] * * * poor service [or] * * * unfair charges," or by imposing fixed time limits within which the requested inspections must be completed. EII further asserted that the Board's involvement in drafting Islandia's resolution was inappropriate; that Board employees have unfairly disparaged EII's work to consumers, electricians, and government officials; and that the Board's actions had caused EII needless expense in those jurisdictions

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[5]The Village's modest size – it is home to an estimated 1,000 families, only a fraction of whom undertake construction and/or electrical projects in a given year – means that Mayor Falco personally signs certificates of occupancy, each one of which is prepared by a single individual, the Town's Building Inspector, whose responsibilities include not only reviewing the electrical inspection report, but also physically inspecting the same construction sites that the electrical inspector does. A single New York Board inspector performs all of the Islandia work.

[6]EII's complaint included, in addition to its claims under § 1 and 2 of the Sherman Act, claims under State statutory and common law and the State and Federal Constitutions, but none of these other causes of action remains in the case. EII's other federal claims were dismissed voluntarily (with prejudice), and the court dismissed its State law claims, without prejudice to their being re-filed in State court.

Rather than face the burden of litigating, all of the governmental defendants other than Islandia entered into settlement agreements with EII, acceding to its demand that its inspections would be considered in granting certificates of occupancy.

where it ultimately obtained the opportunity to compete. The complaint also included allegations that, in places where the Board was the exclusive provider, it was abusing that position, by "threatening [to] retaliate" against customers (or electricians) in those jurisdictions if they gave EII business elsewhere. *See* Ct. App. J.A. 36-78.[7]

2. Notably, although the complaint included a paragraph alleging that the Board has "unbridled power to control prices charged to consumers * * * in all municipalities where competition has not been authorized," *id.* 64 (Compl. ¶118), it is undisputed that the Board's rates are the same in jurisdictions where it is the sole provider and those where competition is open. *See* 35a (noting that "EII does not dispute that the Board charges a uniform rate [throughout the State] and that the fee schedule is disseminated throughout Nassau and Suffolk Counties"). Indeed, the most specific complaint about the level of the Board's rates came in the affidavit of EII's president, who asserted that the Board's rates are unfairly *low*, subsidized by the contributions of its insurance company members. *See* Ct. App. J.A. 650 (affidavit of Richard M. Bivone).

The District Court Decision

Although Islandia and the Board denied (and later,

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[7]Although they figured prominently in the appellate opinion, these last allegations were, from the outset, couched in tentative and highly general terms. Thus, the Board was accused of "question[ing]" electricians who considered retaining EII on inspections in other jurisdictions and "explicitly or implicitly suggest[ing] that retaliatory or harassing measures" would be taken, and was alleged to be in a "unique position to retaliate * * * against electricians." Ct. App. J.A.52.

More important, Petitioners' summary judgment motions homed in on the absence of any *evidence* of retaliation or even threatened retaliation – let alone any incident that had occurred in Islandia – and the absence of even an *allegation* of an effect on *competition* cognizable under the Sherman Act. *See Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961). At oral argument on summary judgment, the district court pointedly pressed Respondent to identify specific evidence that would substantiate its "broad, general" allegations, but EII could not cite any. (Mar. 23, 2001) Tr. 19-21.

through affidavits, refuted) the complaint's central factual allegations, and sought summary judgment on several distinct grounds, the district court issued an opinion addressing the state action immunity issue only, holding both the Village and the New York Board entitled to summary judgment on that basis. *See* App. 31a.[8]

1. Judge Wexler began by noting that, under this Court's case law, antitrust immunity for local government action is derivative in character, *i.e.*, a consequence (1) of the rule that the governmental acts of *States* are categorically beyond the reach of the antitrust laws, *Parker*, and (2) of recognition that States frequently implement their policies through local governments and subdivisions, *see City of Lafayette v. Louisiana Power & Light,* 435 U.S. 389, 416 (1978) (plurality opinion). Thus, when municipal action is challenged, the immunity analysis focuses on whether the action is pursuant to State authorization and whether the State policy contemplated the objected-to effect on competition. *Id.* (citing *Town of Hallie*, 471 U.S. at 40).

2. After reviewing the pertinent New York statutes and regulations, the district court concluded that the "'legislature contemplated the action complained of'" in this case, 38a (quoting *Cine 42nd Street Theater Corp. v. The Nederlander Org., Inc.*, 790 F.2d 1032, 1042 (2d Cir. 1986), and *Hallie,* 471 U.S. at 44), *i.e.*, it was "foreseeable that a municipality would, though it need not, displace competition in administering and enforcing its own electrical inspection program within its limited geographic area by appointing an exclusive agent."

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[8]After Respondent moved, under Fed. R. Civ. P. 12(f), to strike the immunity defense, Petitioners cross-moved for summary judgment on that ground, and both parties submitted affidavits. Petitioners also sought summary judgment based on the substantive deficiencies in EII's antitrust claims and because any conduct by the Board seeking government action was entitled to "*Noerr-Pennington*" immunity. *See City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 379 (1991) (describing *Noerr* as a "corollary" of *Parker* immunity). Its state action ruling, the district court ruled, obviated the need to pass upon the *Noerr-Pennington* issue. *See* App. 42a. n.3.

App. 39a. In reaching that conclusion, the district court emphasized that the New York Legislature expected its fire prevention policy to be accomplished through local government enforcement; that the responsibilities conferred were limited as to both geography and subject matter; and that they involved matters "integral to public health and safety" concerns at the core of traditional local police powers. *Id.*

3. Judge Wexler then rejected EII's contention that immunity should depend on whether or not Islandia's supervision of the Board was "active." Proof of "supervision" is necessary, he explained, when the "*effective decision*" challenged is that of a private party. Here, by contrast, the actions:

> allege[d to] cause[] injury to EII are the municipal defendants' appointments of the Board as exclusive agent, not the alleged unsupervised Board conduct or alleged unsupervised Board fee-setting.

App. 40a.

4. The *Board's* entitlement to immunity, the district court then held, followed as a matter of law. Since "the municipal defendants[']decisions *appointing* the Board as exclusive agent" could not be the basis for antitrust liability, Judge Wexler explained, *see* App. 41a (emphasis supplied) the Board, "as the party receiving those appointments" must be "similarly immune," *id.* A different rule would open the door to "tangential attack[s]" on decisions like Islandia's, *id.*

The Second Circuit Decision

On appeal, the Second Circuit held that the judgment of dismissal could not stand. The appeals court agreed with the district court (1) that New York Law confers the necessary "authority to regulate," and (2) that "suppression of competition" was "foreseeable" – *i.e.*, that the requirements of the *Hallie* test were met – but it found error in Judge Wexler's holding that the immunity analysis did not require

inquiry into "active supervision."[9]

1. By focusing on the lawfulness of Islandia's resolution, Judge Sack reasoned, the district court did not take account of EII's claims that *the Board* was "violat[ing] the Sherman Act by willfully seeking and maintaining monopolies * * * and by abusing its monopoly power by providing low-quality service and by attempting to expand its overall market share by threatening retaliatory action against those persons who use the plaintiff's service where competition is allowed." Because these allegations concerned "transactions [between the Board and] other private parties," the *Midcal* test, rather than the *Hallie* standard, should govern.[10]

2. The court of appeals then distinguished two recent Circuit precedents, *Cine* and *Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc.*, 155 F.3d 59 (2d Cir. 1998),

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[9]The appeals court offered a "common sense" explanation for its conclusion that EII's exclusion was "a foreseeable result of a statute that requires municipalities to enforce a uniform fire code and administrative regulations that condition the issuance of certificates of occupancy upon inspections by town-designated agents":

> Municipalities often use their own employees to enforce a variety of public codes, such as food preparation or building codes, thereby effectively conferring upon *themselves* exclusivity in the market for required inspection services at a cost to private entities that would perform the same services.

App. 15a. Rejecting EII's suggestion that public, but not private, monopoly was foreseeable, the decision continued: "Whom the municipality selected as the party exercising exclusivity is at best tangential to the inquiry into the foreseeability of suppression of competition * * * * the degree of suppression is the same." *Id.*

In holding that the Islandia's resolution fell "within the broad grant of state authority," conferred under the Fire Prevention Code, the opinion, citing the "concept of authority that principles of federalism compel [federal courts] to apply" in the state action immunity setting, rejected EII's argument that the withdrawal of the interpretive regulations supportive of the Board's position should foreclose immunity. App. 14a.

[10]While recognizing that the Board's actions in "pursuit of" Islandia monopoly might be entitled to *Noerr-Pennington* immunity, the appeals court left the issue for the district court to decide.

which had accorded private defendants immunity without any inquiry into "supervision." In those cases, the appeals court explained, "the only anticompetitive actions allegedly taken by the private-party defendants were those of contracting with the state-created entity," App. 23a. In such instances, the "authorization of the government's contracting" necessarily entails "authorization of the private parties' contracting," and the concerns the supervision requirement is "designed to address" necessarily are satisfied. App. 24a.

3. The appeals court then took up the implications of its analysis for the disposition of this case. After noting that the "active supervision" question was "heavily factual," *id.* at 26a – and could not be resolved one way or another on appeal – the court expressed doubt that the assertion of immunity for behavior allegedly "pursuant to" the monopoly would succeed, suggesting that Islandia's power to replace the Board (or invite competition from EII) was akin to the "negative option" review of collectively set rates rejected as inadequate in *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 638 (1992).

4. The court then held that the *Village's* fate should also await the outcome of the "active supervision" inquiry. While recognizing that no decision of this Court has "held that a state's failure to supervise a regulated private party can deprive the state of immunity under *Parker*, even though such a failure can result in liability for the private party," 28a-29a, the Second Circuit declined to dismiss the claims against Islandia. Explaining that there was no need, in advance of a liability determination, to resolve whether injunctive relief against the Village was legally authorized, the decision indicated that such relief would not raise especially "pressing" "federalism-based concerns," *id.* – both because "the Village is not a sovereign" and because EII was "only" seeking injunctive and declaratory relief against Islandia, *id.*

REASONS FOR GRANTING THE WRIT

By holding that *Parker* immunity depends on local

government supervision of the *service* rendered "pursuant to" a State-authorized exclusive designation, the Second Circuit has decided a frequently recurring question of federal law in a manner that requires this Court's review.

The free-floating governmental "supervision" obligation imposed in this case bears scant relation to the narrow, but important, purpose the "active supervision" requirement has served in this Court's immunity case law, *i.e.*, providing further assurance that private *anti-competitive conduct* is, as claimed, authorized by the State. The "low quality service" exception will swiftly "swallow" what the overwhelming majority of Courts of Appeals have – correctly – held to be the rule: that exclusive designations by local governments should be tested under the *Hallie* standard, which focuses on whether *the effect on competition* is State-authorized.

The rule enmeshes federal courts in essentially standardless supervision-of-service review, from which many municipal actions that raise the least plausible Sherman Act concern – and the weightiest federalism sensitivities – are likely to emerge *without Parker* immunity. Government actors who receive immunity must obtain it through the very "heavily factual" litigation that the doctrine is meant to protect against. And private parties, whose participation is indispensable to implementation of important State policies and programs, face the threat of heavy damages, imposed because a court determines that a government actor should have more closely supervised their "service." Indeed, because exclusive *government* provision remains a realistic option in many of these cases, including this one, the practical result of the rule will be to give market competition less sway.

The need for review is underscored by the Second Circuit's further holding – that governmental defendants whose actions have been judicially determined meet the *Hallie* test, must face further litigation (and potential liability) under the "supervision of service" theory – and by its rationale for that ruling, *i.e.*, that the "federalism-based concerns" presented in a case such as this one are subdued.

I. Conditioning Immunity On Governmental Supervision Of Service Quality Has No Support In State Action Immunity Case Law

A. The Second Circuit's Rule Conflicts With Decisions of The Other Courts of Appeals

Although the factual pattern presented in this case – a local government decision designating a single entity to provide a particular service to those within its borders – is "commonplace," *see Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n,* 197 F.3d 560, 565 (1st Cir. 1999), the appeals court's decision – to condition antitrust immunity on "active supervision" of the designee's *performance* – is both singular and contrary to precedent.

1. In two pathmarking 1985 decisions, this Court established that while the status of the *defendant* should not affect the *Parker* immunity analysis, *Southern Motor Carriers Rate Conference, Inc. v. United States,* 471 U.S. 48, 56 (1985), the nature of the *action* at issue – whether the action challenged is "municipal" or "private" in character – has large significance. *Hallie.* Because municipalities can be "presume[d to] act * * * in the public interest," 471 U.S. at 45, and because the core concern of the Sherman Act is with "*private* price-fixing," *id.* at 47 (emphasis in original) – and because the "clear articulation" requirement provides adequate protection against the "only real [antitrust] danger" that municipal action threatens, *i.e.*, "further[ing] purely parochial public interests at the expense of more overriding state goals," *id.* – *Hallie* held,"active [governmental] supervision" – a requirement in cases where the challenged decision is "private," *Midcal* – need not be inquired into. *Id.*

2. Since then, federal courts have adjudicated assertions of immunity in antitrust challenges brought, as this one was, by a plaintiff denied entry to a local market as a consequence of a municipality's designating – by contract, franchise award, or ordinance – a competitor as the exclusive provider of some service within city limits. These decisions, from almost every Circuit (including the Second, prior to the

ruling below) involve a broad range of local government activities, and, almost uniformly, have treated the *Hallie* analysis – *i.e.*, whether State law authorized the local government's action and whether the effect on competition was foreseeable – as dispositive. *See Michigan Pay-Tel Joint Venture v. City of Detroit*, 287 F. 3d 527, 538 (6th Cir. 2002) (pay telephone franchise); *Catalina Cablevision Associates v. City of Tucson*, 745 F.2d 1266 (9th Cir. 1984) (cable television); *L & H Sanitation, Inc. v. Lake City Sanitation, Inc.*, 769 F.2d 517 (8th Cir.1985) (solid waste removal); *Taxicab Drivers' Employees v. Greater Houston Transp. Co.*, (5th Cir. 1985); *Hillman Flying Service, Inc. v. City of Roanoke*, 652 F. Supp. 1142 (W.D. Va. 1987) (civil aviation services), *aff'd* 846 F.2d 71 (4th Cir. 1988) (table); *Buckley Construction, Inc., v. Shawnee Civic & Cultural Development Auth.*, 933 F.2d 853 (10th Cir. 1991) (public construction project); *see also Omega Homes, Inc. v. City of Buffalo*, 4 F. Supp. 2d 187 (W.D.N.Y. 1998)(granting single developer right to build all homes in neighborhood), *aff'd*, 171 F.3d 755 (2d Cir. 1998) (*per curiam*). *But see Englert v. McKeesport*, 637 F. Supp. 930 (W.D. Pa 1986); *cf. Southern Disposal, Inc. v. Texas Waste Management*, 161 F.3d 1259 (10th Cir. 1998) (citing, but not applying "active supervision" requirement); *Michigan Pay-Tel*, 287 F.3d at 536 (noting lack of clarity in prior Sixth Circuit case law).[11]

3. A similar approach has been followed in challenges to exclusive State designations. *See, e.g., Neo-Gen, Inc. v. New England Newborn Screening Program*, 187 F.3d 24 (1st Cir.

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[11]Although the district court in *Englert* – which also involved a complaint by an electrical inspector about an exclusive designation – held that immunity required the local government's supervising the prices charged by its designee, it questioned whether plaintiff, whose "injuries * * * flow[ed] from * * * the exclusive arrangement between the [municipality and the service provider] – rather than (alleged) "unsupervised fee-setting" – would have *standing* to challenge the rates, *id.* at 935, highlighting a further defect in EII's case. Ultimately, the Third Circuit held the antitrust claims failed for *yet* another reason applicable here: the absence of required concerted action. *See* 872 F.2d 1144 (3d Cir. 1989).

1999) (exclusive State designation of neonatal screening provider); *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*, 810 F.2d 869 (9th Cir. 1987); *see also* 1A AREEDA & HOVENKAMP, ANTITRUST LAW (2000) ¶221d7 at 373 & n. 61 (noting cases and explaining that "where a state agency contracts exclusively for garbage disposal or bus service with private parties, it is reasonable to presume that such a monopoly is consistent with public needs").[12]

4. In analytically similar cases arising from exercises of local zoning powers, courts have treated State authorization as dispositive. For example, in *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111 (10th Cir. 1991), the court sustained immunity for zoning decisions favoring downtown business interests over would-be suburban shopping mall developers, upon finding *Hallie* authorization – without inquiring into the sufficiency of any governmental "supervision" that downtown stores might receive.

This Court's most recent local government immunity case, *Omni Outdoor*, is to the same effect. Addressing a claim that a municipal ordinance left plaintiff's competitor with 95% of the local billboard advertising market, the Court held that both the municipality and the private defendant were entitled to immunity, based solely on the outcome of the *Hallie* inquiry. Indeed, the principal thrust of the *Omni* opinion was that even when shown to have been "taken pursuant to a conspiracy with private parties," "governmental *regulatory* action" may not be "deemed private – and therefore subject to antitrust liability."[13]

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[12]These courts have been required to resolve a question, expressly left open in *Hallie*, *see* 471 U.S. at 46 n.10, but not presented here: whether State executive agencies and political subdivisions other than municipalities must meet the authorization and active supervision requirements.

[13]499 U.S. at 375. As we discuss below, the *Omni* Court declined to address miscellaneous allegations of trade libel and other private anticompetitive conduct, seeing these as distinct from the question of immunity for actions in which both defendants had a part.

5. As the district court in this case recognized, the principle on which these decisions rest is one fully applicable here. The *Hallie* standard governs when the harm to competition is the product of government, rather than private, action.

> The basic question in antitrust cases that involve municipal and private actors is whether the municipality or the regulated party made the effective decision that resulted in the challenged anticompetitive conduct. If the municipality * * * was the effective decision maker, then the private actor is entitled to state action immunity, regardless of state supervision.

Michigan Pay-Tel, 287 F. 3d at 538. *See also Mass. Sch. of Law at Andover v. ABA*, 107 F.3d 1026, 1036 (3d Cir. 1997) (explaining that *Midcal* test applies in "situations where private parties were engaging in conduct * * * which led directly to the alleged antitrust injury"); *Zimomra v. Alamo Rent-A-Car, Inc.*, 111 F.3d 1495, 1499 (10th Cir. 1997).

6. Here, once the designation of the Board was effected – action taken *by Islandia* unilaterally and pursuant to State authorization – the harm *to competition* (and the injury to EII) was complete. The alleged delays and deficiencies in service impose no further harm on competition (or on EII).

B. The Factual Allegations Do Not Meaningfully Distinguish This Case From Exclusive Designation Cases Applying The *Hallie Standard*

Although the Second Circuit's decision indicated that "possessing" a monopoly might not in itself trigger the *Midcal* inquiry, it stressed that allegations that the Board was "abusing" its monopoly, by providing "low-quality-service" "pursuant to the monopoly" required "active supervision" analysis. *See* App. 24a (distinguishing *Cine*, on the ground that it had only involved allegations of "entering into a contract" with the governmental actor).

These distinctions are not tenable. Were the Second Circuit rule the law, "low quality service" allegations could be

readily leveled, and many of the actions – properly – held immune in exclusive designation cases just discussed likely could not meet the additional "active supervision of service" requirement. *See Motor Carriers*, 471 U.S. at 57 ("We decline to reduce *Parker's* holding to a formalism that would stand for little more than the proposition that [the plaintiff] sued the wrong parties").

1. To the extent, as the Second Circuit suggested, that the distinction between exclusive government *contracts* and municipal *resolutions* has relevance, it would not favor denying immunity here. The principal difference between long-term contracts and resolutions is that if EII could convince either Islandia's Trustees, or the voters to whom they answer, that its entry would enhance service, the exclusion would end promptly. By contrast, where there is a contract, the public can be saddled with its terms, no matter how ill-advised, for long periods of time. *See Cine* (99-year lease term); *Charley's Taxi*, 810 F.2d at 872 (15-year contract for airport taxi service). *See Evans v. City of Chicago*, 10 F.3d 474, 478 (7th Cir. 1993) (*en banc*) (plurality) (contrasting contractual commitments, which must be kept "by virtue of the contract clause of the Constitution," with legislation, *i.e.*, "[w]hat one City Council enacts, another may repeal"); *see also Hallie*, 471 U.S. at 45 n.9 (highlighting ways in which "municipal conduct is * * * exposed to public scrutiny").[14]

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[14]Although the Board receives its fees from individuals, where in some contract cases, the government pays the provider, others involve contracts where the "designee" pays the government for the privilege to charge third parties. *See Cine*; *see also Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989) (sustaining provision mandating that lawyers purchase malpractice insurance from bar). The contract/resolution distinction is especially irrelevant where allegations involve *service*, which – however paid for – is provided *to* the public, and if there were a contract, Islandia obviously could fund its obligation by charging a fee to those whose properties are inspected. *See Arsberry v. Illinois*, 244 F.3d 558, 566 (7th Cir. 2001) (governments "have to get revenue somehow, and the 'somehow' is not [ordinarily] the business of the federal courts"). Indeed, a dissatisfied Islandia resident may seek redress against an inspector without

2. The appeals court's decision seriously overstates the significance of the boilerplate allegations of "monopoly abuse" here. Even if the "only alleged antitrust violation" in the *Cine* "was entering into a contract," the disappointed-competitor plaintiff in that case surely *could have* alleged that the Nederlander Organization was insufficiently prompt in filling ticket orders for the Broadway shows it staged "pursuant to the exclusivity" at issue there, see App. 27a (noting that *Cine* plaintiffs had asserted that "'collusive and monopolistic' pricing policies" would result from challenged decision) – and the plaintiff in *Omni* could just as readily have alleged that COA was not responding quickly enough to its customer requests. In fact, *Charley's Taxi* held defendants immune, despite findings of the district court (which had undertaken a *Midcal* analysis), to the effect that the governmental defendant:

> does nothing * * * to ensure adequacy of the provision of taxi service, and in fact has no control over the SIDA taxi drivers * * * * [the private agency] runs its own dispatch service, and no one from the state monitors this * * * * Complaints about taxi drivers are routed to SIDA for action rather than being dealt with by the state.

562 F. Supp. 712, 723 (D. Haw. 1983); *See generally Mass. Food Ass'n*, 197 F.3d at 565 (describing laws limiting "the number of taxicabs to be operated" and the number of cable franchises awarded as "examples of commonplace state or local regulation, sometimes accompanied by local price

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having to establish that she was the third-party beneficiary of a government contract.

Notably, if the designation were by contract, the nature of the service and the dollar amounts involved are such that New York's competitive bidding statute would not apply. *See N.Y. State Chapter, Inc. v. N.Y. State Thruway Auth.*, 88 N.Y. 2d 56 (1996); *Schulz v. Cobleskill-Richmondville Sch. Dist.*, 197 A.D. 247 (3d Dep't 1994) (limiting requirements for professional services contracts). The net result is that State law would allow the Village to prefer a high bidder – but a disappointed competitor could sue under *antitrust* laws based on allegations about the "quality" of service rendered.

regulation but sometimes not").

3. Ironically, this case is distinguishable from many of the others by the fact that Petitioners *could* satisfy a supervision requirement. Unlike cases like *Cine* or *Jacobs, Visconsi*, where the municipalities could not claim to have retained control over the service rendered to customers, the Village, as a practical matter, examines each inspection report, and in the course of other inspection responsibilities, scrutinizes first-hand the buildings inspected by the Board – which (unlike the lessee in *Cine*) has a direct incentive to address the concerns of customers (*i.e.*, the Trustees' constituents).

C. Allegations Of Low-Quality Service Do Not Trigger A Supervision Inquiry

The necessary implication of the Second Circuit's decision – that other courts' exclusive designation decisions are only "technically" correct, in view of plaintiffs' "failure" to allege insufficient supervision of quality – is an untenable one.

1. Under a proper reading of this Court's precedents, allegations of "low quality service" in *Omni would not have* warranted a switch to the *Midcal* "active supervision" analysis. The state action immunity doctrine does not impose a free-floating obligation to "supervise" private conduct generally – or even private conduct "pursuant to a [government-conferred] monopoly." (Nor, as we discuss below, does an allegation that "supervision" would improve "service" bear on whether supervision is required by *antitrust law*).

Instead, the concerns the active supervision requirement "designed to address" arise only when private, *anti-competitive behavior* is defended on the ground that the State authorized it. 1A AREEDA & HOVENKAMP ¶224 at 413 ("State supervision prevents the injury the antitrust laws ordinarily prevent"). Thus, as Judge Posner explained, in a decision rejecting an antitrust claim arising from a grant of an

exclusive license to provide prison phone services:

> Plaintiffs' real argument * * * is * * * that a monopolist, namely the State of Illinois (and its subdivisions), exercising as it does an iron control over access to the inmate market, has rented pieces of the market to different phone companies, in much the same way that an airport will charge a high fee to concessionaires eager to sell to the captive market represented by the airline passengers who perforce spend time in the airport. * * * * The concessionaires will pass on much of the fee to their customers, who will thus pay a higher than competitive price. States and other public agencies do not violate the antitrust laws by charging fees or taxes that exploit the monopoly of force that is the definition of government * * * * *Nor do the persons with whom the states contract violate the antitrust laws by becoming state concessionaires, provided those persons do not collude among themselves or engage in other anticompetitive behavior, of which charging high prices as a state concessionaire is not a recognized species.*

Arsberry, 244 F.3d at 566 (emphasis added); *Cine* 792 F.2d at 1036 ("collusive and monopolistic" pricing policies); *see generally Mass Food Ass'n*, 197 F.3d at 564 ("What is centrally forbidden is state licensing of arrangements between private parties that suppress competition – not state directives that *by themselves* limit or reduce competition") (emphasis in original).

2. The Seventh Circuit's teaching applies with even greater force here. Like "high prices," "low-quality service" may be a *consequence* of conduct that the antitrust laws prohibit, but it is not "anticompetitive behavior" triggering a supervision obligation. Indeed, the result objected to in *Arsberry*, "high prices" – though not *behavior* prohibited under the Sherman Act – are a preeminent place in antitrust law. *See Ticor*, 504 U.S. at 638 (noting "the gravity of the antitrust offense" when competitors set rates by agreement); *Hallie*, 471 U.S. at 47 (stressing absence of danger of "*private*

price fixing"). Here, there is no serious claim that competition from EII will lower the New York Board's rates: Respondent alleged that, as a non-profit, the Board charges unfairly little. Nor can it be contended, as was apparently admitted to have been the case in *Arsberry*, that Islandia's decision to limit the market is a mere revenue-raising measure. Plainly, the New York Board, which charges the same rate everywhere, makes no effort to collect "monopoly rents" in Islandia – and the Village receives nothing from the Board, in return for its designation.

Finally, as we develop below, unlike the airport leasing power hypothesized in *Arsberry* – and those at issue in other decisions sustaining immunity – the municipal power that Islandia exercised implicates the very core of its governmental responsibility: its obligation to protect life and property within its jurisdiction. Unlike goods or services whose connection to the "public welfare" is suspect, the *sole* purpose of electrical inspections is to prevent fire and the loss of life and property it can cause. *Cf. The Monopolies Case* (striking down royally granted playing card monopoly).[15]

3. Limiting the supervision requirement to *anticompetitive behavior* is consonant with the structure of the Sherman Act – and with the limitations on its reach recognized in *Parker*. Even in antitrust claims involving private commercial activities, the distinction between conduct and effect is fundamental, *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (that firm's restraints have the same *effect* as concerted action is not a basis for

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[15]Although neither the Court majority nor leading commentators have been persuaded that *The Monopolies Case*, 77 Eng. Rep. 1260 (Q.B.1602), is a paradigm for Sherman Act, *but see Omni*, 499 U.S. at 386 (Stevens, J., dissenting), the monopoly condemned in that case was granted "in order to generate revenues for the crown," *id.* *See* 1A AREEDA & HOVENKAMP ¶200d at 145 (concluding, after review of legislative history and background, that "the Sherman Act was not regarded as an instrument" for striking down state-created monopolies; "Its job was to pursue *private* restraints * * * and to leave publicly-imposed restraints to other forms of government intervention").

Section 1 liability); App. 25a (noting Judge Hand's observation in *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 429 (2d Cir. 1945), that a person does not violate the antitrust laws when it has monopoly "thrust upon it"). It is of paramount significance where government action concerned. *Exxon v. Governor of Maryland*, 437 U.S. 117, 133 (1978) ("if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed"); *Fisher v. City of Berkeley*, 475 U.S. 260, 266 (1986).

II. Federal Court Review Of Service Supervision Is Incompatible With Principles On Which *Parker* Immunity Is Grounded

A. The Rule Intrudes Deeply On State and Local Governmental Decision Making

The premise that *Parker* immunity should be decided through a federal court's determination of the adequacy of a local government's supervision of a designee's performance is, in a real sense, a contradiction in terms.

1. As has already been emphasized, there is no class of cases – from cable television to civil aviation to zoning rules – in which "low quality service" and inadequate supervision could not be alleged. Courts already asked to decide antitrust claims brought by disappointed *low-bidders* for public contracts, *see Buckley Construction* (contract awarded to second-lowest bidder), could be required to decide suits by disappointed *higher* bidders, based on allegations that the selected entity is performing poorly, with insufficient oversight.

Indeed, this case – where the (unusual) fact that the Board's rates are uniform, published, and low, precluded EII from making a plausible *price* allegation – is a vivid illustration of the proposition that almost any designation can be challenged. *See Omni*, 499 U.S. at 375 ("exception" under consideration"would swallow up the *Parker* rule").

2. As the appeals court conceived of them, questions of "service" and "supervision" are,"heavily factual," App. 28a – meaning that an important aspect of immunity would be lost in *every* case, even when the court rules for the defendant. *See* 1A AREEDA & HOVENKAMP ¶222b at 387 ("The *Parker* doctrine is designed to be an immunity, not merely a defense that can be offered at trial * * * * The importance of *Parker's* status as an immunity is particularly strong when the defendant is a government agency, subdivision, or government official carrying out duties. Such entities and officials cannot be intimidated from carrying out their regulatory obligations by threats of costly litigation, even if they ultimately win"); *accord Martin v. Memorial Hosp.*, 86 F.3d 1391, 1396 (5th Cir. 1996) (interlocutory appeal of immunity denial authorized because "an appeal after judgment would come too late to protect the right"); *Praxair, Inc. v. Florida Power & Light Co.*, 64 F.3d 609 (11th Cir. 1995) (same).

EII defined "quality of service" here to include: the promptness with which inspections are scheduled when requested; the duration and intensity of the inspections; and the time taken between inspecting and issuance of a report. The corresponding allegations of "defective supervision" included the "lack" of a regulation fixing a time limit for performing inspections and of special "recourse [for] * * * poor service [or] * * * unfair charges." It will be the terminally unimaginative competitor who cannot identify *some* similar, comparably "factual," allegation about its rival's service – or hypothesize some form of missing, corrective government supervision.

3. Even on a fully developed factual record, there will be no principled basis by which a federal court could decide whether the quality of service is unacceptably low or the supervision too slack. On the contrary, evidence may disclose that the designee was selected because of its thoroughness and integrity – despite a reputation for taking longer (or charging more) than a competitor; or that choosing a

seemingly less expensive, unproven provider would raise risks and monitoring costs. *See Buckley Construction*. Such review would be at least as "vague [and] impractical" as the "*ex post facto* judicial assessment of 'the public interest,'" rejected in *Omni*. *See* 499 U.S. at 377; *see also Community Communications Co. v. Boulder*, 455 U.S. 40, 67 (1982) (Rehnquist, J., dissenting) (expressing concern that rule would open "Pandora's Box," requiring "federal courts * * * to engage in * * * wide-ranging, essentially standardless inquiry into the reasonableness of local regulation").[16]

4. This inescapable unpredictability is of special concern to parties in the New York Board's position, who, in the absence of immunity, face potential treble damages liability under the Sherman Act. Under the Second Circuit's rule, the Board's immunity – depends on a federal court's *ex post* judgments about (1) the quality of its "service" *and* (2) the means by which the local government has opted to oversee its performance. Beyond their obvious unfairness, immunity rules that make private party involvement so perilous interfere with the ability of *State and local* governments to pursue programs that *Parker* is meant to protect. *See Motor Carriers*, 471 U.S. at 56.[17]

B. No Sherman Act Purpose Is Served By Requiring

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[16]*See Mass Food Ass'n*, 197 F.3d at 564 (close judicial review "might well [produce] more competition and greater consumer welfare. But it would come at the cost of second-guessing the democratically elected legislature's decisions about the proper balance between competition and other social policies that are commonly reflected in such legislation").

[17]Although the majority in *Ticor* noted the anomaly of holding a private party liable based on deficiencies in government review – but adjudged it tolerable in view of the "gravity of the antitrust offense," at issue, 504 U.S. at 638, allegation of "low quality service" (made by a would-be competitor) surely does not similarly tip the scales. *See* 504 U.S. at 647 (O'Connor., J., dissenting) ("Liability under the antitrust laws should not turn on how enthusiastically a state official carried out his or her statutory duties. The regulated entity has no control over the regulator, and very likely will have no idea as to the degree of scrutiny that its filings may receive").

Supervision Of Traditional Public Services

As *Hallie* and *Omni* underscore, the review just described entails vast federalism costs, and – even leaving aside chilling effects and resources diverted – it is by no means certain that the results with judicial review will be convincingly "better" than the initial municipal decision. But those decisions also remind that even if there were substance to claims that "supervision" would improve "service," these grievances– that government is not serving the interests of its constituents – do not sound in antitrust. *See Omni,* 499 U.S. at 375 ("vindicat[ing] * * * principles of good government" is not "the end" to which the Sherman Act is "directed"); *cf. Lease Lights, Inc. v. Public Serv. Co.,* 849 F.2d 1330, 1334 (10th Cir. 1988)("The constitutional invalidity of the attempted state regulation is not an appropriate basis for disregarding state action immunity").

1. Municipal actions that yield results that are anticompetitive or objectionable can give rise to State remedies, *Fisichelli v. Town of Methuen,* 956 F.2d 12, 14 (1st Cir. 1992), and where the claim is poor service to constituents, those aggrieved have recourse to the ballot box. *Mass. Food Ass'n*, 197 F.3d at 566 ("unless * * * a statute licenses or commands a *private* restraint, this is a matter for the voters and not for the federal courts – at least so far as the Sherman Act is concerned"). These constraints on municipal action — imposed from "above" and "below" – undergird the "presum[ption]," formulated in *Hallie*, 471 U.S. at 45 and affirmed in *Omni* (on difficult facts) that acts of municipal government are in public interest.

2. That presumption must apply with maximal force where the "service" at issue is one that traditionally performed by government – and that is bound up with public safety. *Cf. California Dental Ass'n v. FTC.*, 526 U.S. 756, 771-72 & n.10 (1999) (noting need to take "'public service aspect'" into account where antitrust claims arise from the "professional context") (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788-89 (1975)).

3. Legislation mandating inspections is premised on recognition that, were matters left to the "market," properties that, as a matter of public safety, should be inspected, would not be. 1A AREEDA & HOVENKAMP, ANTITRUST LAW (2000) ¶221d7 at 373 ("[t]he fact that * * * states or local governments find it useful to engage in self-provision and even to "monopolize" some services * * * may suggest the state's conclusion that a competitive market will not adequately meet the public needs for such services").

Indeed, EII's accusations of cursory inspections (wholly false on the record in this case) actually make a similar point: that "consumers" in such a market – often eager to take occupancy of properties without major remedial expenses – cannot be counted on to prefer "high quality," *i.e.*, careful, inspections. *See Camara v. Municipal Court*, 387 U.S. 541, 552-53 (1967) (Clark, J., dissenting) (explaining that "[i]mmediate prospects for costly repairs" leads large percentages of homeowners to deny entry to inspectors under voluntary safety programs).[18]

4. Although the decision below repeatedly described Islandia's action as "*displac[ing]* competition * * * with a regulatory structure," App. 19a (quoting *Motor Carriers*, 471 U.S. at 64), the reality – acknowledged by all parties and in the Second Circuit decision, *see id.* 15a – that inspections are a service that the Village could itself provide on an exclusive basis is also of substantial practical significance.

This difference is significant because, unlike in *Ticor* or *Midcal*, the likely alternative is not a return to market forces – but rather exclusive provision, with government performing the service. The net result would then be no increase in competition – and a change in "service" that Islandia's Trustees have determined would be for the worse. *See Motor Carriers*, 471 U.S. at 61 (Congress did not "intend[] to resolve

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[18] In a district court affidavit, the Board's Vice President explained that the fact that inspectors do not receive additional compensation for successive visits to the same property creates a tension between profit-seeking and safety responsibilities. Ct. App. J.A.733 (Rowe affidavit).

conflicts between two competing interests [*i.e.*, federalism and competition] by impairing both more than necessary").

5. Such a state of affairs will not be an isolated phenomenon. If the Second Circuit's regime – making less-than-all-out competition prohibitively risky for all involved – were the norm, many localities inclined to consider or experiment with private provision will opt to continue municipal provision.

As the court in *Catalina Cablevision* explained, in a somewhat different context, the Sherman Act's interest in competition will not always be advanced by presenting government actors with an all-or-nothing choice.

> Tucson has just begun to regulate cable television. It is not unreasonable for not licensing all service providers at once. After some experience gained with the first provider, the City may wish to reassess its needs and will be better able to anticipate problems not obvious at the outset. Caution in granting license to additional service providers, as other Arizona cities appear to have exercised, would seem to be the prudent course of action for the City to take.

745 F.2d at 1270; *see also Motor Carriers*, 471 U.S. at 59 (stressing that States may pursue a "balance between the efficiency of collective ratemaking and the competition fostered by individual submissions").

C. Allegations Of Failure To Supervise "Retaliatory Threats" Do Not Alter The Immunity Analysis

Although the appeals court made clear that claims of "low quality service" were sufficient in themselves to alter the immunity analysis, it also indicated that Islandia might be liable based on "failure" to "actively supervise" the Board's alleged retaliatory threats.

1. At the outset, those miscellaneous allegations should not have detained the appeals court, let alone led it to re-shape immunity decision. *See Omni*, 499 U.S. at 384 (remanding claims of "private anticompetitive actions such as

trade libel, the setting of artificially low rates, and inducement to breach of contract"). They were pleaded with extraordinary ambiguity in EII's complaint and were not substantiated with any evidence at summary judgment.

The notion that the Board's power in the Islandia "market" – which is not only 1 of 1,000, but one of the smallest among the 1,000 – could be leveraged to foreclose competition is implausible on its face. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). There was no evidence – or even an *allegation* – of an *effect on competition* in any market *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224-25 (1993) (observing that "[i]t is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors.*'"and that "federal antitrust laws * * * do not create a federal law of unfair competition") (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962));

2. But even if the allegations had been substantial, the imposition of an "active supervision" requirement was contrary to settled law. The *Midcal* inquiry is not triggered by allegations that State or local government has failed to supervise private anti-competitive conduct within its jurisdiction; it attaches only when the government actor has *authorized* the anti-competitive conduct. *See Hallie*, 471 U.S. at 46 (describing requirement as performing an "evidentiary function," *i.e.*, "one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy").

Thus, in *Patrick v. Burget*, 486 U.S. 94 (1986), and *Ticor*, the claim was that the State, having authorized private parties to engage in actions the Sherman Act would ordinarily condemn – group boycotts and collective price-setting, respectively – must police that conduct. *See Patrick*, 486 U.S. at 100 (active supervision "prong" reached after "the challenged restraint [is shown to] be 'one clearly articulated and affirmatively expressed as state policy'") But here, obviously, there is no suggestion that any New York law or Islandia ordinance *authorized* the supposed threats. *See*

Northern Securities Co. v. United States, 193 U.S. 197, 338 (1904) (companies' State charters did not mean that challenged merger "was under the authority of the states").[19]

The decision in *Omni* is instructive. As noted above, although the plaintiff had alleged "private," "anticompetitive" acts no less "pursuant to" the challenged ordinance than the allegations here, the Court did not treat those as a basis for imposing a supervisory liability on the municipal defendant. 499 U.S. at 384.

3. Although The Village could withdraw the designation if presented with serious enough proof of unfair competition by the Board, the Sherman Act obviously does not impose an affirmative *duty* to root out and prosecute business misbehavior. *Cf. Printz v. United States*, 521 U.S. 898 (1997). *see City of Rohnert Park v. Harris*, 601 F.2d 1040 (9th Cir. 1979) (cities may not sue as *parens patriae*).

III. The Second's Circuit's Decision To Require The Village To Defend This Suit Is Contrary To Precedent

Although the Second Circuit's reinstatement of the claims against the Village was closely bound up with its fundamentally erroneous interpretation of "active supervision" – and would be reversed on that basis – that ruling extends the decision's flawed analysis and raises further reason for this Court's review.

1. For many of the reasons already stated, the conclusion that "federalism based concerns" are "less pressing" than usual in this case is a jarring one. The suit arises from a municipal decision concerning public safety inspections within municipal borders – and involves a claim (by a would-be competitor of the designated provider) that this traditional municipal service is not being performed as well as it would

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[19]Although the court described these alleged transgressions as "pursuant to" the monopoly conferred by Islandia, the same could be said of the Patent Office, when a patentee makes unlawful use of its market power.

if the Village took a more proactive supervisory role. The "market" at issue is one for which it is conceded that municipal governments may, based on their assessment of the public interest, exclude all private provision.

2. The Second Circuit's stated reasons for its contrary conclusion – that the case involves a village, rather than a "sovereign" State, and that "only" prospective relief was sought against Islandia, are squarely at odds with this Court's case law.

3. Although State action precedent has consistently recognized that municipalities do not *automatically* enjoy "sovereign" status, *see Lafayette*, it has been equally clear that they "draw their legal life from state law," *Fisichelli*, 956 F.2d at 14 – and when action is "authorized" in the full sense set out in *Hallie*, as both courts here found Islandia's designation to have been – it *is* that of the State. *See Omni*, 499 U.S. at 377 ("personal liability of *city* officials" would intolerably "compromise *the States'* ability to regulate their domestic commerce") (emphasis added). As that case underscored: "*any* action that qualifies as state action is *ipso facto* * * * exempt from the operation of the antitrust laws." *Id.* at 379 (citation omitted).

Nor are "federalism concerns" confined to concerns of State sovereignty. *See Omni*, 499 U.S. at 370 (immunity is grounded on "principles of federalism *and* state sovereignty") (emphasis added). *Hallie* explained that a stringent authorization requirement should not be imposed, in part because of the "deleterious and unnecessary" effects it would have on "municipalities' local autonomy and authority to govern themselves"; *See also Spallone v. United States*, 493 U.S. 265, 276 (1990) ("federal courts * * * must take into account the interests of state and *local authorities* in managing their own affairs") (citation omitted, emphasis added); *Rizzo v. Goode*, 423 U.S. 362 (1976); *Boulder*, 445 U.S. at 70 (Rehnquist, J., dissenting) (noting absence of "distinction between States and their subdivisions with regard to the pre-emptive effects of federal law").

4. The premise that Islandia was "only" facing the risk of a trial, and a possible injunction – but not damages – is no more sound. As explained above, "[t]he *Parker* doctrine is designed to be an immunity, not merely a defense that can be offered at trial" 1A AREEDA & HOVENKAMP at 387. To leave the issue to be sorted out *after* "costly litigation," *id.*, is to sap it of much of its value. *Martin*, 86 F.3d at 1396 ("an appeal after judgment would come too late to protect the right").

5. The Second Circuit's rule is all the more extraordinary given that the court had already held that the *only action* of the Village that was at issue – the designation – was within its authority under State law. Although the Second Circuit gave far too much credence to EII's allegations that the Board was improperly expanding market share, *see supra*, its decision attached great significance to the Village's *non*-involvement in such unsavory (alleged) behavior. *See* App. 25a (underscoring that these were "transactions [between the Board and] other private parties").

Although the court described the alleged threats as "pursuant to" the resolution, there was no allegation that Islandia neither participated in, benefitted from or was aware of any such conduct, *see* 15 U.S.C. § 1, nor that it intended to monopolize any market. *See Times-Picayune Pub. v. United States,* 345 U.S. 594, 627 (1953). To the extent the court assumed the Sherman Act liability can be imposed for failing to prevent unauthorized private anticompetitive activity, that cannot be so. *See supra*.

Finally, although the court asserted that the Village could be kept in the case to assure that a remedy, in case of liability, "would be []adequate," it offered no reason for assuming that, in the (extraordinarily improbable) event of a decision that the Board had violated the Sherman Act by supposed "private" retaliatory threats, any congressionally authorized remedies would be inadequate.

Conclusion

The petition for certiorari should be granted.

Respectfully submitted,

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